

**ARGUMENT SECTION OF
APPELLANT'S REPLY BRIEF
(Filed July 22, 2004)
(Pages 26-31)**

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**V. THE APPELLANT MUST BE RE-
SENTENCED BECAUSE SUBSTANTIAL
UPWARD ADJUSTMENTS WERE FOUND
AGAINST HIM, IN VIOLATION OF
BLAKELY V. WASHINGTON, 2004 WL
1402697 (JUNE 24, 2004)**

The United States Supreme Court on June 24, 2004 changed the legal landscape with regard to sentencing. Its decision in *Blakely v. Washington*, __ U.S. __, 124 S.Ct. 2531, 2004 WL 1402697 (June 24, 2004) held unconstitutional a Washington state sentencing scheme very similar to the United States Sentencing Guidelines.

The cornerstone of *Blakely*, which has sent shock waves through the federal system, is its application of the principle of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000):

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."

Blakely concluded that the "statutory maximum" for *Apprendi* purposes is:

“... the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” 2004 WL 1402697 (Emphasis in *Blakely*). 124 S.Ct. 2537.

Because the Washington state system is very similar to the federal guidelines system, it [is] clear that *Blakely* regards the “statutory maximum” as being the guideline range which can be established by reference *only* to facts submitted to and found by a jury beyond a reasonable doubt. In essence, this translates to the base offense level of a given charge. Consequently, any upward adjustments or departures could not be based upon relevant conduct, cannot be decided by a judge, and cannot be determined on the basis of the preponderance of the evidence.

This application of *Apprendi*, is of course, unexpected and is directly contrary to the consistent decisions in this court regarding the application of *Apprendi*. *United States v. O’Neal*, 362 F.3d 1310 (11th Cir. 2004); *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001); *United States v. Tinoco*, 304 F.3d 1088, 1100 (11th Cir. 2002); *United States v. Nealy*, 223 F.3d 825, 829 n.3 (11th Cir. 2000); *United States v. Harris*, 244 f.3d 828, 829-30 (11th Cir. 2001).

Since the decision in *Blakely*, courts have come to a variety of conclusions regarding its effect on the federal guidelines. Compare *United States v. Booker*, __ F.3d __, No. 03-4225 (7th Cir., July 9, 2004) (finding, in essence, upward adjustments unconstitutional under *Blakely*); with *United States v. Pineiro*, No. 03-30437 (5th Cir., July 12, 2004) (finding the federal guidelines constitutional in the fact of *Blakely*).

It appears, nonetheless, that, at the very least, upward adjustments imposed without a jury finding beyond a reasonable doubt are unconstitutional under *Blakely*.

In this case, Martin Chambers was sentenced to a term of 188 months (15 years 8 months), based upon the following analysis:

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| 1. Base offense level §2S1.1(a)(2)
[including the value of the laundered
funds as \$700,000] | 22 |
| 2. Knowledge that the laundered funds were
proceeds of drugs, §2S1.1(b)(1) and (a)(2) | +6 |
| 3. Conviction under 18 U.S.C. §1956,
§2S1.1(b)(2)(B) | +2 |
| 4. Sophisticated laundering pursuant to
U.S.C. §1.1(b)(3) | +2 |
| 5. Role in the offense, §3B1.1(c) | +2 |
| 6. Adjustment for obstruction of justice, §3C1.1 | +2 |

Of these, the following calculations are improper under *Blakely*, because they were not found by the jury beyond a reasonable doubt:

1. 2S1.1(a)(2) requires that the base offense level be 8 plus the number of levels from the table in §2B1.1. Because the value of the laundered funds was set at \$700,000, an additional 14 levels were added. Although the amount of laundered funds was contained in the indictment, the jury made *no finding*, and was directed to make no finding

regarding the exact amount of laundered funds. As a consequence, 14 points (from §2B1.1) are improper, and the base offense level should be 8.

2. Sophisticated laundering under 2S1.1(b)(3) was determined by the court based upon a preponderance of the evidence, and was never submitted to or decided by the jury. [+2].

3. The adjustment for role in the offense, under §3B1.1(c) was likewise determined by the court on a preponderance of the evidence standard, and never submitted to or decided by the jury. [+2].

4. An adjustment for obstruction of justice under §3C1.1 was determined after a hearing by the court based upon a preponderance of the evidence. Again, it was never submitted to or decided by the jury. [+2].

Because of the nature of the offense charged, it appears that the adjustments under §2S1.1(b)(1), regarding knowledge of the funds having been derived from drugs, and the fact of conviction under 18 U.S.C. §1956 pursuant to §2S1.1(b)(2)(B) apply.

The result is that Chambers, under *Blakely*, has a final score, before consideration of any downward departures, of 16. This provides him a sentencing range of 21-27 months.

While there is some dispute whether *Blakely* can be applied retroactively, to cases on collateral review [see *In re Dean*, No. 04-13244 (11th Cir., July 9, 2004)], there is no doubt that *Blakely* applies to cases on direct appeal, which are not final, such as this one.

Under *Teague v. Lane*, 489 U.S. 288, 301 (199):

"[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final".

It is clear from the position that this, and every other Circuit has taken, that no one predicted that *Apprendi* would be applied in the manner it was in *Blakely*. Clearly, this is a new rule which is applicable to cases which are not final. This point was underscored by Justice O'Connor, in her dissent in *Blakely*, where she recognized there is an unlikelihood that the rule would be applied retroactively to cases on collateral review, nonetheless:

"... all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack." *Blakely*, *supra*, 124 S.Ct. 2543, 2549 (O'Connor, J. dissenting).

Particularly for a man of Mr. Chambers' age, the enhanced sentence works a substantial prejudice against him, and should be vacated.

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